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*A PROFESSIONAL CORPORATION

August 29, 1984

VIA EXPRESS MAIL

James S. Lesar, Esq.
1231 Fourth Street, S.W.
Washington, D. C. 20024

Re: H.R. 5164 (CIA-FOIA Bill)

Dear Mr. Lesar:

Enclosed please find a memorandum dated August 14, 1984, appending the two documents we discussed over the phone on August 28, 1984 - i.e., Meir Westreich's July 31st eleven-page memorandum and Richard Criley's June 19th three-page letter to Ira Glasser.

Should you have any further questions about this matter between now and the end of this week, please do not hesitate to contact me at the above phone number.

Yours sincerely,

Doug

Douglas E. Mirell

DEM:jf

Enclosures

ACLU

MEMORANDUM

TO: Members, Board of Directors
American Civil Liberties Union - National

FROM: American Civil Liberties Union - Southern California
R. Samuel Paz, President
Joyce Fiske, Committee on National Legislation
Ramona Ripston, Executive Director

DATE: August 14, 1984

RE: Proposed Policy of ACLU-Southern California on CIA-FOIA Bill - H. R. 5164

The enclosed memorandum is presented in support of the position of ACLU-Southern California in opposition to H.R. 5164, and in response to the memorandum from Mort Halperin to Ira Glasser, dated June 15, 1984, on the subject of "Southern California's Questions on H.R. 5164." Enclosed as well, for your convenience, are copies of the following:

1. Letter from ACLU-Southern California signed by Ramona Ripston and Samuel Paz to ACLU affiliates and national board members (6/11/84);
2. Memorandum, Halperin to Glasser (6/15/84);
3. Memorandum, Glasser to ACLU affiliates and national board members (6/18/84);
4. ACLU-Northern California letter signed by Richard Criley to Glasser (6/19/84).

The ACLU-Southern California policy on H.R. 5164 is as follows:

The American Civil Liberties Union of Southern California opposes enactment of H.R. 5164 and S.B. 1324. The proper solution for the backlog of FOIA-CIA requests is not increased exemptions, but rather is found in additional FOIA staffing and

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633 S. Shatto Place
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stronger judicial review of obstructive conduct. Any bill which seemingly reduces review, or hampers its implementation, increases the risk of abuse by the CIA.

In June 1984, the national board passed a resolution to the effect that the national staff, in supporting H.R. 5164, acted in conformity with existing national ACLU policy.

In July 1984, the Board of Directors of ACLU-Southern California urged the national board to examine the substance of our policy difference. We do not feel that the motion the national board considered in June gave a fair hearing to our point of view.

If we are to be bound by policy #527, there should be a full hearing on the merits of our position, as that policy requires. We have not had that. Certainly, simple due process demands it.

While the Committee on Government Operations has sent the bill to the full House of Representatives, it is unlikely that there will be time to have the House vote and the Conference Committee reconcile the differences before Congress adjourns on October 4th.

We, therefore, ask that you schedule a full hearing on the merits of the bill at the October meeting of the Board of Directors.

We would like to point out that a number of other organizations besides the ACLU-SC and the ACLU-NC oppose the bill. The list includes: the American Newspaper Guild, the Radio TV News Directors' Association, the Society of Professional Journalists, the Organization of American Historians, National Committee Against Repressive Legislation (NCARL) and the Fund for Open Information and Accountability, Inc.

In keeping with policy #527, the ACLU-SC will not lobby for our position in Congress although individuals in a personal capacity may express their opinions to their representatives.

In the interest of fairness we trust that this matter will be placed on the October agenda of the Board of Directors.

enclosures
cc: Members, Board of Directors of ACLU-Southern California
Ira Glasser, Executive Director of ACLU (National)
Mort Halperin, Executive Director of National Security Project
ACLU Affiliate Chairs and Executive Directors

PEOPLE'S LAW CENTER

Meir J. Westreich
Attorney at Law

Jean Greenwood
Legal Assistant

MEMORANDUM

July 31, 1984

TO: ACLU Affiliates
Members, Board of Directors of ACLU (National)
Ira Glasser,
Executive Director of ACLU (National)
Mort Halperin, Executive Director of
National Security Project

FROM: Meir Westreich, Member, Board of Directors
of ACLU-Southern California, Member,
ACLU-SC Committee on National Legislation

RE: Policy Proposal of ACLU-Southern California
on CIA-FOIA Bill - H.R. 5164

In reviewing the H.R. 5164 materials (CIA-FOIA Bill) we became concerned about the memorandum from Mort Halperin to Ira Glasser, dated June 15, 1984, on the subject of "Southern California's Questions on H.R. 5164." This memorandum, which apparently was circulated to all of the affiliates and national board members in response to your letter explaining our affiliate's opposition to H.R. 5164, is inaccurate in material respects, and seriously underestimates the damaging aspects of the CIA-FOIA bill.

For the reasons set forth below, ACLU-Southern California urges the national ACLU to reverse its position on H.R. 5164 (even as amended by House committee on July 28, 1984) and oppose its enactment. While such a course of action would be awkward, to say the least, it would nevertheless best serve our mutual goals of preserving the FOIA and the integrity of our constitutional process of judicial review over executive misconduct.

1711 North Broadway, Suite 1 • Santa Ana, California 92706 • (714) 541-4323

1. Judicial Review

Mr. Halperin minimizes the significance of the judicial review provisions in H.R. 5164, concluding that:

. . . Thus, although this bill alters normal procedure for discovery with respect to two issues, it will not alter the information we are able to get during litigation.

Finally, contrary to what Ramona's letter implies, the legislation in no way restricts the court's ability to conduct an in camera inspection and the committee report emphasizes this and suggests that courts should conduct in camera reviews when necessary.

A. What limitations on judicial review are in fact enacted by H.R. 5164?

1. Discovery: (Definition: "Discovery" refers to the process by which a litigant obtains information, often from the other litigant, in preparation for trial or hearing on the merits.)

a. Depositions: Any litigant in the federal courts is entitled to take depositions of parties and/or witnesses, by oral or written examination, without court order. Under H.R. 5164, any litigant seeking to enforce its terms may not take any depositions whatsoever, not even by court order.

b. Agency Deposition: Any litigant in the federal courts may take a deposition from a public entity or agency by requiring the entity/agency to produce for deposition a person who has knowledge of a requested subject, and who has authority to speak for the entity/agency. Under H.R. 5164, any litigant seeking to enforce its terms may not depose the CIA, not even by court order.

c. Interrogatories: Any litigant in the federal courts is entitled to submit written interrogatories to any party, without court order. Under H.R. 5164,

any litigant seeking to enforce its terms may not submit any interrogatories whatsoever, not even by court order.

d. Production of Documents: Any litigant in the federal courts is entitled to submit requests to a party that such party produce documents or things for inspection/copying, without court order. Under 5164, any litigant seeking to enforce its terms may not request production of documents or things, not even by court order, unless and until the litigant has already proved his/her claim that the CIA has acted improperly under the terms of H.R. 5164. Production of documents that occurs only after prevailing on the merits is not "discovery."

e. Requests for Admissions: Any litigant in the federal courts is entitled to submit requests to a party that such party admit certain facts. Under H.R. 5164, any litigant seeking to enforce its terms may submit requests for admissions. This is the sole discovery tool permitted under H.R. 5164, and is nearly useless if the litigant cannot employ other discovery tools to (i) obtain information, and/or (2) ask for explanation of any denials.

f. Scope of Discovery: Any litigant in the federal courts may pursue discovery of any information reasonably calculated to lead to relevant evidence, that is not privileged, and which is reasonably accessible to or within the control of the party or witness from which it is sought. Under H.R. 5164, any litigant seeking to enforce its terms has no effective discovery rights whatsoever except to seek confirmation of facts already known to the litigant.

g. Privilege: When a party or litigant asserts that the information sought in federal litigation is privileged, the party asserting the privilege has the burden of asserting it and showing its

applicability; further, the privilege must be asserted by a ranking official, who must make a particularized showing as to each document or subject sought, often subject to in camera review to test the validity of the asserted privilege; further, a spurious assertion of privilege can lead to sanctions against the party or witness asserting the privilege. Under H.R. 5164, any litigant seeking to enforce its terms has no effective discovery rights that can be denied, spuriously or otherwise, and the CIA is relieved of any burden of proof whatsoever.

2. Right to Initiate and Conduct Litigation:

a. Complaint: Any person may file a lawsuit in federal court, on the unverified (unsworn) signature of counsel only, provided the complaint states sufficient facts which, (1) if true, would entitle the plaintiff to the relief sought, and (2) places other parties on notice of charges and relief sought. Only after reasonable discovery may a plaintiff be obliged to support his/her complaint by sworn submissions based upon personal knowledge or admissible evidence (by summary judgment motions). Under H.R. 5164, a litigant seeking to enforce its terms cannot file an action unless he/she is able, prior to filing the lawsuit, to prove his/her case by sworn submissions reflecting personal knowledge or other admissible evidence (presumably referring to the Federal Rules of Evidence).

b. In Camera Hearings: Normally, in camera hearings (in the judge's chambers) are employed to permit the court to examine documents sought by one party when another party or witness claims that the documents are privileged. However, in camera hearings are available only after an action is filed. Under H.R. 5164, in order to file in the first place, a plaintiff must be able to prove his/her case by sworn submissions on personal

knowledge or other admissible evidence, without benefit of any discovery whatsoever. This will limit in camera hearings to those few cases when a litigant seeking to enforce H.R. 5164 can prove a violation prior to filing the action.

c. Hearings on the Merits: In normal federal litigation, the rule provides for personal testimony, with the right of all parties to examine parties and witnesses, whether in court or by deposition which is submitted to the court. Under H.R. 5164, this procedure is all but abandoned:

(1) The court is instructed to employ sworn submissions (affidavits or declarations under penalty of perjury) "to the fullest extent practicable";

(2) All sworn submissions of plaintiffs suing the CIA must be based upon "personal knowledge or otherwise admissible evidence"; however, CIA sworn submissions need only "demonstrat(e) . . . that exempted operational files likely to contain responsive records currently perform the functions" defined as operational records (emphasis added). There is no requirement that the CIA affidavits meet the strict rules of evidence, as required of plaintiffs, and apparently the CIA need only "demonstrate" "current" compliance with the law to meet its burden.

d. Remedies: In most federal litigation, any party who fails to comply in good faith with reasonable discovery requests, or who otherwise willfully or vexatiously multiplies or extends proceedings, or who otherwise engages in dilatory or obstructive tactics, can be assessed various forms of sanctions by the court, to compensate the injured party and to ensure that such conduct will not be repeated. Under H.R. 5164, the sole and

exclusive remedy that the court can order is that the CIA search and review the files that it had improperly failed to review in the first instance; further, it appears that the CIA prevails so long as it is in "current" compliance with H.R. 5164; further, the CIA can require the dismissal of the action, at any time and in its sole discretion, simply by agreeing to make the requested search. Thus, there is no penalty for delay, obstruction, or any violation of H.R. 5164.

B. What should be axiomatic to ACLU is that a right that is not enforceable is hardly a "right" at all.

C. ACLU has numerous policies, and the courts have issued countless rulings, which have deemed discovery as fundamental to due process of law.

D. We know of no other law that bars virtually all discovery to a litigant in an action against a public entity; that requires a litigant to be able to prove his/her case prior to filing the case; that requires one party to conform his/her evidence more closely to the rules of evidence than another party; that bars a federal judge from imposing penalties on parties who deliberately or willfully obstruct, delay or urge frivolous postures; or that permits a party to avoid adverse consequences of its improper conduct by unilateral dismissal.

Discovery in FOIA cases is not as severely restricted as Mr. Halperin suggests. Perfunctory depositions and interrogatories which are designed solely to obtain preliminary information as to whether a particular category of files exists, or the names and titles of custodians or relevant witnesses, can generally be had without too much difficulty, and may be extremely valuable. While this information is collateral and foundational, it is often necessary for a reasonable opportunity to identify the files or documents sought. Furthermore, the burden of limiting discovery under normal rules, and in present FOIA cases, is on the party resisting it, i.e., the CIA.

Mr. Halperin is simply incorrect when he states that a litigant under H.R. 5164 can "suggest" various forms of discovery to the court. The bill expressly bars such discovery altogether, and gives the court no discretion to order that discovery.

Mr. Halperin's contention that discovery limitations under H.R. 5164 apply only to "allegations that documents have been improperly placed solely in designated files or that files have been improperly designated-but not with respect to other issues as whether files relate to the subject matter of an abuse investigation" is simply inaccurate. The precise language of H.R. 5164 is that the discovery limitations apply to " proceedings under paragraphs (3) and (4) of this subsection", to wit: "(3) when a complainant alleges that requested records were improperly withheld because of improper placement solely in exempted operational files" and "(4) when a complainant alleges that requested records were improperly withheld because of improper exemption of operational files." These two paragraphs cover the entire gamut of issues relating to "improper placement" and "improper exemption" and are not limited, as stated by Mr. Halperin, to "improper placement and improper designation of exempted files." To put it simply, no litigant seeking to prove that the CIA has conducted abuse investigations which it denies having made will be able to take depositions of CIA employees, or conduct true discovery, to obtain the evidence with which to prove it.

Therefore, ACLU's successful "insistence" on "de novo review" is virtually useless. The only litigants who might conceivably succeed in litigating even the most egregious violations by the CIA will be those with the resources to obtain information by "informal means," and who can afford expensive and exhausting litigation---even when the posture of the CIA is frivolous or illegal on its face.

Thus, we can state categorically, H.R. 5164 will limit the information that will be discoverable in an action under H.R. 5164.

Furthermore, while Mr. Halperin is technically correct that H.R. 5164 does not "restrict the court's ability to conduct an in camera inspection," it does:

1. Vastly reduce, by eliminating discovery, the number of situations in which a litigant can request an in camera inspection--and courts do not generally conduct such inspections without a request;

2. Require a plaintiff to prove his/her case before the inspection will occur--in fact, before a search and review even occurs;

3. Vastly reduce the number of actions that will be filed by raising insurmountable obstacles to many litigants, particularly those of limited means.

What is most disturbing is that ACLU is endorsing, for the very first time, a bill which will effectively immunize a public entity from suit in a substantial area of its responsibility. Forgetting even the subject matter of this bill, ACLU should never support a bill which will establish the precedent of selectively permitting certain litigation tools to be employed in actions against the government. If anything, rules of standing and privilege provide the government with too much protection.

If this bill is enacted, we will see subsequent efforts to limit discovery in other actions against the government. The courts are already too solicitous of the concern over unfortunate public officials overburdened by lawsuits under the Constitution and the Civil Rights Acts, sometimes specifically referring to the burdens of discovery. ACLU does not need to suggest few ways of obstructing such litigation, or undermining its efficiency by elimination of discovery tools.

2. Definition of Operational Files

The CIA has never blanched at conducting illegal activities in the past. Furthermore, the CIA has always engaged, continues to engage, and will likely continue to engage in activities that are deemed lawful by the government, but which we deem to be

violations of constitutionally protected rights, or beyond constitutionally delegated authority. We can therefore assume that such conduct of either ilk will continue for the foreseeable future. Thus, the "definitions" and "restrictions" under H.R. 5164 are only so good as they can be effectively enforced. This bill certainly does not increase such ability to enforce, at least as to those areas addressed by the bill. It in fact reduces substantially the enforcement mechanisms that are otherwise available in all other lawsuits against the CIA.

Assuming that the CIA, from time to time, will conduct itself in bad faith, particularly when it engages in unlawful domestic intelligence work or covert activities, we can also assume that the CIA will find creative means to misinterpret this bill and all of its carefully crafted definitions and restrictions. Without an effective means of judicial review, debates over the meanings of these terms in the bill are a meaningless intellectual exercise.

Furthermore, since when does ACLU codify something into law simply because the courts repeatedly rule in that fashion? Do we support statutes for the death penalty--with perhaps humane means of execution as an "improvement"--because the courts have repeatedly upheld the constitutionality of the death penalty? If the courts become firm in their newly fashioned good faith exception to the exclusionary rule, shall we then help draft legislation that will minimize the impact of the exception, but which also codifies it? If the courts were to restrict discovery by civil rights litigants, beyond enforcement of privileges, would we then codify that into statute as well?

Only one reason is heard for supporting this bill: If we relieve the overburdened CIA of search and review responsibilities as to operational files, they will have more time within which to search and review other files, and therefore be able to make more timely responses to FOIA requests and reduce the existing lengthy backlog. Assuming this to be a fair trade-off (and I do not), what is the justification for also restricting judicial review by adding all those novel restrictions on the judicial proceedings? What did we obtain in exchange for agreeing to those pernicious provisions?

3. CIA Backlog

Mr. Halperin states, with finality: "There was and is no other way (but H.R. 5164) to eliminate the backlog and speed up the process."

To the contrary, steps could be taken immediately which would "eliminate the backlog and speed up the process."

a. Increase Staffing: Congress could always increase staffing provided for FOIA functions.

b. Strengthened Judicial Sanctions: Congress could enact civil and/or criminal penalties (as opposed to the generalized penalties available for all federal litigation) for individuals and/or the CIA when there are willful obstructions or delays in the performance of FOIA responsibilities. Deterence should be a popular philosophy around our "law and order" capital right now.

In any case, even if we cannot obtain these alternative means of eliminating the backlog or speeding up the process, we should not set a precedent under which an agency or Congress can gut a program or law supported by ACLU by simply failing to afford adequate funding or enforcement. Many laws that we have supported have been materially weakened by inadequate funding or enforcement. Sometimes, strengthening occurs at unexpected times, such as the recent, and completely unexpected, strengthening of the Voting Rights Act during the Reagan Administration.

While it is arguable that well-funded organizations will not suffer much under this new bill, the vast majority of Americans and political-social groups will be unable to pursue their rights under H.R. 5164. ACLU should not encourage enactment of laws which presume that ACLU and other civil libertarians will always be able to afford a "National Security Project" or a Mort Halperin.

Recent committee amendments to H.R. 5164 require the CIA to report for two (2) years to Congressional oversight committees concerning efforts to deal with the backlog of FOIA requests. Once again, H.R. 5164 provides no effective means for the public to enforce the provisions of the statute.

The public must instead rely on the subsequent actions of the oversight committees to enforce the CIA's implied promise to reduce the backlog and the response time to FOIA request. Given the fact that these committees have failed to act heretofor on the CIA's notorious failure to respond within existing FOIA time restrictions, the promise of semi-annual reports from the guilty party (CIA) for two (2) years offers little more than one more unenforceable promise of future remedial action.

ACLU-Souhern California does not share the view that H.R. 5164 is not dangerous. If all we had agreed to was the exemption from search and review of operational files, we might agree. Given the unjustified and frightening precedent of enacting such severe restrictions on judicial review, we find the bill to be completely unacceptable, and worthy of our most vigorous efforts to prevent its enactment.

If we fail to oppose the bill, and prevent its enactment, we predict that we will see a repetition of such proposed restrictions on other litigation against the government. Our efforts to prevent such repetition will be severely compromised by our identification with this bill as, in effect, a co-author.

The issues presented by H.R. 5164 justify our full and vigorous efforts at defeating this bill--by whatever means that we can employ to that end, consistent with our own principles.

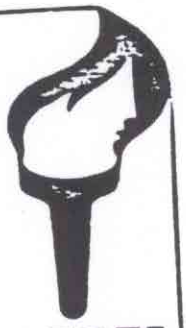
We suggest therefore that national:

1. Take all feasible steps to reverse national ACLU policy; and

2. Employ our resources to the fullest extent in turning both the Congress and the public against this unwarranted attack on both the FOIA and the judicial system.

MJW/bc:ds

#1



ACLU

AMERICAN
CIVIL LIBERTIES UNION
OF SOUTHERN CALIFORNIA
633 S. Shatto Place
Los Angeles, California 90005
Telephone (213) 487-1720

June 11, 1984

Dear Friends:

For almost a year we have watched and studied proposed legislation (S. 1324 and H.R. 5164) which would exempt from the search and release requirements of the FOIA the "operational files" of the CIA. Our Executive Committee on June 5, 1984 voted, without opposition, to take a position against it (see attached statement) and to communicate that position to members of Congress, to the affiliates and to members of the national Board of Directors.

Mort Halperin, Director of the ACLU's National Security Project, came to our meeting on Tuesday night as well as Angus Mckenzie, Director of the Media Alliance Freedom of Information Project. Much material had been circulated in advance of the meeting. After two hours of discussion, the members of our Executive Committee agreed that there was little if anything to be gained from the passage of this legislation and the possibility of suffering some severe losses was very real.

The questions raised were as follows:

1. Judicial Review - will the legislation restrict discovery and take away encouragement for an in camera inspection by a judge?

2. The Definition of Operational Files - would domestic counter-intelligence (illegal domestic spying) be exempt from search and release and therefore deny us information about illegal domestic activities by the CIA? And won't the legislation result in more and more files being designated "operational?"

3. CIA's Backlog of Requests for Information Under FOIA - aren't there better solutions to the problem of the long delays in getting information from the CIA other than creating additional exemptions under the law?

It was our feeling that we must be at the forefront of fighting anything that smacks of less openness in government and that this bill appears to do that.

We have included in this mailing a copy of the House Bill and some background information. If you share the feeling that there are just too many important unanswered questions to support this legislation, please communicate with the members of the House of Representative's Committee on Government Operations (list included) and your own representatives in Congress. Please also suggest that the subject be placed on the agenda of the next meeting of the national Board of Directors.

Thank you.

Most sincerely,

Ramona Ripston
Executive Director

R. Samuel Paz
President

enc.

#2.

AMERICAN CIVIL LIBERTIES UNION

National Headquarters
132 West 43 Street
New York, NY 10036
(212) 944 9800

Norman Dorsen
[illegible]

Ira Glasser
[illegible]

June 15, 1984

MEMORANDUM

TO: Ira Glasser

FROM: Mort Halperin

Re: Southern California's Questions on H. R. 5614

Here is the analysis you requested of the questions raised in Ramona's letter of June 11th to ACLU affiliates:

1. Judicial Review

The bill in no way affects judicial scrutiny of CIA claims that material is exempt from disclosure. What it does do is to establish certain procedures with regard to judicial review of disputes over the application of the provisions of H.R. 5614, while making it clear that all such issues are to be determined de novo by the courts. This was not fully true in the Senate version, but it is in the House version, because we insisted on it.

These procedures simply codify practices that courts have invariably followed. With respect to allegations that documents have been improperly placed solely in designated files or that files have been improperly designated -- but not with respect to other issues such as whether files relate to the subject matter of an abuse investigation -- the bill does limit plaintiffs' right of discovery. However, we view this as a change in form rather than substance. Plaintiffs may still "suggest" to the court that certain information be made available or that certain specific questions be answered. In practice, that's what happens now. Courts now exercise very close supervision and normally severely restrict, plaintiffs' efforts to take discovery in FOIA cases against the CIA. Thus plaintiffs' "demands" for discovery are now treated by the courts as suggestions or requests, which are fully scrutinized and restricted before the CIA has to provide any specific information or answer specific questions. Thus, although this bill alters the normal procedure for discovery with respect to two issues, it will not alter the information we are able to get during litigation.

Finally, contrary to what Ramona's letter implies, the legislation in no way restricts the court's ability to conduct an in-camera inspection and the committee report emphasizes this and suggests [illegible] conduct in-camera reviews when necessary.

. . .

. 2. Definition of Operational Files

Ramona asks whether files relating to "domestic counter-intelligence (illegal domestic spying)" would be exempt from "search and release". First of all, she must mean "search and review" since the bill in no way affects the criteria for "release" of information. Second, the answer is clearly "no". CIA domestic counter-intelligence activities are conducted by the Office of Security which does not have authority to designate those files as "operational" files. Moreover, and more important, the legislation is drafted so as to insure access to all files relating to domestic spying.

Unlike earlier versions, including the bill passed by the Senate, the latest House draft, which is the only version we support, provides clearly that all files relating to the specific subject matter of an investigation will be subject to search and review as if this legislation had not been enacted. This means that files relating to all of the subjects investigated by the Rockefeller, Church and Pike Committees as well as those investigated by the CIA and the Justice Department will be subject to search and review. In regard to any more recent or future abuses, including domestic spying, the procedure would work as follows. If we or anyone else suspects that the CIA has or is engaged in illegal or improper activity, we can make such an allegation to the CIA. The Agency is then obliged by its own rules to conduct some investigation. Regardless of how thorough that investigation or the conclusion reached is as to whether there was an impropriety, we can then make an FOIA request and get a search and review of all operational files relating to our allegation. Moreover, the scope of the search and review is determined by the scope of our allegation, not their investigation.

We have asked all users of the Act to let us see any documents related to domestic spying, or any other subject, which was received from the CIA under the FOIA and which would not be subject to search and review under the Act. No critic of the bill or anyone else has shown us such a document. The CIA has reviewed the complete list of CIA documents in our report "From Official Files" which contains all significant documents that we know of released from the CIA and has assured the Congress, in writing and on the record, that all the documents would continue to be available. (That list is attached to this memorandum).

We do not understand the question raising the spectre of more and more files being designated. The CIA does not now "designate" files. The bill permits it to designate only certain specifically defined files as operational. While the CIA says it will not designate all files eligible for designation, our analysis of the bill assumes that they would do so. Any allegation of improper designation would be subject to de novo judicial review.

3. CIA Backlog

Ramona asks whether there is not a "better solution" to the problem of long delays "other than creating additional exemptions." The bill does not create any new exemptions. It simply permits the Agency not to search through certain files which contain no information which is released under current exemptions or any conceivable set of exemptions. We do not believe that there was any other way to get the CIA to eliminate its backlog and to begin to respond to requests in weeks or months rather than years. When the 1974 amendments set 10-day deadlines for responses to FOIA requests, we and others went into court to seek to enforce the time limits. The courts uniformly delinced to do so on the grounds that the agencies were receiving far more requests than Congress anticipated and that it was up to Congress to remedy the situation. The CIA argued persuasively to the Congress that there was no way it could act faster as long as it had to review operational files, since those files could only be reviewed by senior officials familiar with the operation. We concluded that it was far better to have the CIA devote its time to reviewing files from which material is regularly released than to turning the pages of files from which nothing is ever released. There was and is no other way to eliminate the backlog and speed up the process. Our task was to accomplish this in a way that did not diminish public access to information now available or likely to be available under policies we would advocate. We think that we did that; your article in The Nation and my responses to Southern California's concerns in this memorandum should make that clear.

NH/ml

#3.

AMERICAN CIVIL LIBERTIES UNION

National Headquarters
132 West 43 Street
New York NY 10036
(212) 944 9800

Norman Dorsen
President

Ira Glasser
Executive Director

June 18, 1984

MEMORANDUM

TO: ACLU Affiliates

FROM: Ira Glasser

Re: Freedom of Information Act/CIA Legislation

I have previously sent you my article in The Nation explaining why we support H. R. 5614, a bill which exempts the CIA from the obligation to search and review certain files. The article explains why we believe the bill we have negotiated will reduce the intolerable delays now experienced by people making FOIA requests of the CIA, without diminishing public access to information that we believe ought to be available.

Subsequently, you received a package of materials from the Southern California affiliate, in support of its Executive Committee's decision to oppose the bill. Their material cites several reasons why they think the bill ought to be opposed. While some of the points they raise are dealt with in my Nation article, others are not and I thought it would be useful to provide you with our response to the questions raised by Southern California. Accordingly, I asked Mort Halperin to respond to their specific questions. His memorandum to me is attached.

I want to emphasize, as Ramona has, that this disagreement does not reflect a "split" between the affiliate and the national office, nor is it the product of any residual problems relating to the financial structures eight of a year ago, which is entirely resolved now. Rather, this is an issue on which reasonable people can disagree. But it is also an extraordinarily complex issue, involving very complicated and difficult facts and procedures. It is not easy to master or explain how the FOIA relates to the CIA or what the effects of this legislation are. Over the past six months, I have spent dozens of hours in Washington with John Shattuck, Mort and other Washington staff scrutinizing this legislation in great detail. We all began with enormous skepticism, and raised all of the questions Southern California is now raising. We decided that to resolve those questions, we would insist on certain clear and unambiguous provisions or else we would

oppose the legislation. Each of our demands was eventually met, not in the Senate version of the bill, which we would not support, but in the House version, which we do support.

The difficulty and complexity of these issues are reflected by the fact that despite the review Southern California has made of the materials it received, I do not think they fully understand the House version of the bill and the report that accompanies it and which gives additional meaning to the bill itself.

In short, after very careful analysis over many months by me and by those on our staff who are the acknowledged experts on the FOIA, I am persuaded that there is no danger of any loss of information, much less the "severe losses" Southern California thinks possible. Moreover, I believe there is a real possibility of modest but important gains from this legislation. Had I not reached this conclusion and been comfortable with it, I would not have made the decision that the ACLU should endorse the House version of the bill.

Of course, the ACLU is and must remain at the forefront of the fight against secrecy and improper CIA surveillance as well as all covert operations. That requires us to struggle against all bills and executive actions that diminish public access to information. But it does not require us to oppose legislation that "smacks of less openness" or that merely "appears" to permit more secrecy if, upon careful scrutiny and analysis, we determine that the danger is only apparent and that the legislation will promote our objectives. We rely on the FOIA in our fight against improper CIA actions and we cannot afford to judge proposals by their surface appearance rather than their real consequences.

If you have any specific questions that are not answered by my previously distributed Nation article or by the attached memorandum, please let me know.

mi
enclosures

#4

ACLU
AMERICAN CIVIL LIBERTIES UNION
OF NORTHERN CALIFORNIA, INC.
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June 19, 1984

National Board, American Civil Liberties Union

Attention: Ira Glasser

At the June 14 meeting of the ACLU-NC Board of Directors, I was delegated by a majority of the Board to convey our disagreement with the national ACLU's endorsement of HR 5164/S.1324.

We have followed the course of the legislation providing for a FOIA exception for the operational files of the CIA and the controversy which accompanied it for the past year. Until now, we have refrained from taking a position, since the national office had taken only a qualified one until last month when it endorsed the final House version (HR 5164).

In stating our grounds for disagreement, however, we wish to make clear that we do not seek to contribute to making the issue a divisive one in the ranks of civil libertarians. We believe that it is an issue on which civil libertarians can honestly disagree.

We feel that, as Ira Glasser states in his Nation article that the bill is not a civil liberties "disaster." We are not convinced, however, that it does in fact "represent a step forward."

Under the present Administration, it is doubtful if any signficant FOIA materials will be forthcoming from the CIA, whether or not HR 5164 is passed. Armed with new discretion to classify material and keep it classified under EO 12356, there is little reason to believe that the CIA will not use this and other exemptions under the FOIA to nullify any possible gains won under the provisions of HR 5164. The exceptions to the exemption for the operational files are not capable of implementation without the willing testimony and cooperation of the CIA officialdom. There is no independent oversight authority or paper trail to establish, for example, that a document in the operational files has lost its immunity because it was secretly circulated outside of the operational files and returned without copies being made. It is doubtful if Bill Casey (or others) will voluntee such information.

Since the provisions of HR 5164 are intended to make only the intelligence product open to scrutiny, this would appear to give a blanket exemption to most of the CIA's covert actions (like the giving of secret funds to Napoleon Duarte), unless it can be established by independent sources of information that the actions were unlawful in the narrow sense of a specific violation of an act of Congress or the Constitution. While it is true that covert actions have been protected by other exemptions (primarily classificiation) and have become known mainly by illegal leaks, the ACLU has never agreed to their exclusion from public review. The pratical, short run, effort of HR 5164 may not add to the concealment of such information, but the principle involved is not unimportant in the long run.

There is also the concern expressed by historians and other academic researchers that the provisions of HR 5164 may lock up the secrets of the CIA covert actions for the duration of the statute. With the passage of time, arguments can be made for the declassifications of ancient materials when a national security rationale is no longer tenable. HR 5164 seems to place another barrier to the eventual release of documents essential to the writing of history.

The CIA is not just another government agency. It has been the position of the ACLU that CIA covert actions were by their nature illegitimate and in direct conflict with constitutional democracy. We have sponsored legislation to prohibit all covert actions and limit the CIA to intelligence gathering and analysis. It would appear that this principled position is contradicted at least in spirit by endorsement of an exemption for the files which contain the records of the covert action branch of the agency. We are giving a mixed message to the membership and undercutting the potential of a long term campaign to achieve a basic reform of an illegitimate agency which has proved itself to be a serious threat to democratic society.

Nor can it be seriously argued that the granting of the exemption to the operational files was the only alternative to a more serious erosion of the FOIA, such as the blanket exemption sought for the entire agency. We have not seriously tested the strength of the public opposition which could have been rallied against such a proposal. The process of negotiation and bargaining which the ACLU undertook in regard to the provisions of S.1324/HR 5164 by their nature did not encourage such a public campaign.

The precedent set by agreeing to the exemption of the operational files of the CIA may haunt us if the FBI and Justice Department launch a campaign to obtain a comparable exemption for the FBI's investigative files. I am assuming that the ACLU's opposition to exempting FBI files is absolute and uncompromising. But our endorsement of HR 5164 certainly does not strengthen our position in re the FBI or other agencies.

June 19, 1984

National Board, American Civil
Liberties Union

In the balance, therefore, we believe that the negatives outweigh the positives in regard to HR 5164. Based upon my report, the ACLU-NC Board voted to endorse this position in principle and authorized me to convey our position to the national Board.

Sincerely,

Richard Criley (fmh)

Richard Criley
Vice Chairperson
ACLU-NC Board of Directors

RC:fmh

cc: Joyce Fiske, ACLU of Southern California
Ramona Ripston, ACLU of Southern California
M. Anne Jennings, National Board Representative, ACLU-NC
Eva Jefferson Paterson, At-large National Board member
Mort Halperin, Center of National Security Studies
Norman Dorsen, President, National Board of Directors